

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 7 Case
)	Number <u>89-10140</u>
JIM LEVERETT, INC.)	
d/b/a JIMBO'S GAS & GOODIES)	
)	
Debtor)	
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BANKERS FIRST FEDERAL SAVINGS)	FILED
AND LOAN ASSOCIATION AND)	at 4 O'clock & 55 min. P.M.
JAMES D. WALKER, JR., TRUSTEE)	Date: 10-23-90
FOR THE ESTATE OF)	
JIM LEVERETT, INC., DEBTOR)	
)	
Movants)	
)	
vs.)	
)	
CENTER BUILDING COMPANY, INC.)	
)	
Respondents)	

ORDER

This case was originally brought by Jim Leverett, Inc., debtor, as a Chapter 11 proceeding filed February 2, 1989. On November 2, 1989 during the pendency of this proceeding as a Chapter 11 case, the debtor contracted to sell the following described property of the estate:

All that lot or parcel of land with improvements thereon situate, lying and being in the City of Barnwell, Barnwell County, South Carolina, being designated as Tract A on plat recorded in Plat Book P, Page 222 of Barnwell County records,

bounded and measuring as follows: NORTH by Gilmore Street, 170 feet, more or less; EAST by lands of Center Building Company, Inc.,

and being designated as Tract B on the
aforementioned plat, measuring 100 feet, more
or less; SOUTH by land of Center Building
Company, Inc., shown as Tract B on said plat,
measuring 105 feet, more or less; and WEST by
U.S. Highway No. 278, for 115 feet, more or
less. Tax Parcel No.: 072-09-05-001
(hereinafter "subject property")

On November 22, 1989, the debtor filed a notice of intent to sell
the subject property free and clear of liens and encumbrances.
After proper notice this court by order dated December 29, 1989,
authorized the sale of the subject property free and clear of all
liens and encumbrances.

By order dated March 8, 1990 this case was converted to
a case under Chapter 7. James D. Walker, Jr. was named trustee.
By final report dated April 19, 1990 the trustee abandoned
pursuant to 11 U.S.C. §554 all real estate of the debtor, which
included the subject property.

On June 8, 1990, the debtor and Bankers First, as the
holder of a first in priority security interest in the subject
property, filed an amended motion to sell this property free and
clear of liens and encumbrances and restrictive covenant. In the
deed of Albert L. Tankersley, Jr. to J. Wayne Raiford, et al.,
dated November 30, 1971, recorded in Title Book 13W at page 255
Barnwell County, South Carolina records, and all subsequent deeds
in the chain of title of the subject property, the restrictive
covenant at

issue stated:

The Within Deed of Conveyance is hereby made with the specific limitation and restriction that the above described premises shall not be used for the purpose of conduction thereon a retail business for the sale of grocery, meat, produce, diary, or bakery products, or any of them, and this limitation shall be binding on the Grantees herein, their successors in title, heirs, assigns, administrators, or executors, and this limitation shall run with the title to the lot herein conveyed.

Center Building Company, Inc. ("CBCI") the owner of the adjacent parcel of property objects to the debtor's amended motion and moved to dismiss. CBCI contended the Chapter 7 trustee is the real party in interest; and since the trustee has abandoned his interest in this property, the amended motion requires dismissal. In response to the motion to dismiss, the Chapter 7 trustee moved to rescind his abandonment and participate as movant herein. Under the facts and circumstances of this case this court allowed the trustee to revoke his abandonment and participate as movant and overruled the motion to dismiss¹.

The debtor acquired the property in question in 1986.

¹This court is aware that allowing the trustee to revoke his abandonment is contrary to the weight of authority. However, the unique circumstances of this case requires a different result. The motion at issue originated with the debtor-in-possession with an intervening conversion and abandonment. CBCI did not rely upon the abandonment of the trustee to its detriment and is not prejudiced by the revocation of the abandonment beyond being required to defend against the motion on its merits. For authority establishing the finality of a trustee's abandonment see, 4 Collier on Bankruptcy ¶554.02[2] (L. King 15th Ed. 1989) and cases cited therein.

While cognizant of the restrictive covenant the debtor renovated the improvement located on the subject property changing the character of the property from that of a gasoline service station to a convenience store. After renovation in addition to gasoline, the debtor sold items in direct violation of the restrictive covenant. The subject property was operated as a convenience store from 1986 to the present. The value of the subject property without the restrictive covenant is, according to the sales contract sought to be approved, One Hundred Twenty-Five Thousand and No/100 (\$125,000.00) Dollars. With the restrictive covenant in place, the value of the property does not exceed Seventy-Five Thousand and No/100 (\$75,000.00) Dollars. At the time the restrictive covenant was created the subject property was carved from a larger parcel. The remaining larger adjacent parcel is owned by CBCI under lease to Food Lion grocery stores.

Bankruptcy Code §363(f)² authorizes the sale of property

²11 U.S.C. §363(f) provides:

- (f) The trustee may sell property under subsection (b) (c) of this section free and clear of any interest in such property of an entity other than the estate, only if
- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
 - (2) such entity consents;
 - (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
 - (4) such interest is in bona fide dispute;
 - (5) such entity could be compelled, in a

free and clear of any interest where applicable nonbankruptcy law would allow it or where the interest is in dispute. In this case, as the properties affected by the restrictive covenant are located in the State of South Carolina, the nonbankruptcy applicable law under §363(f) is the law of South Carolina. Under South Carolina law "affirmative relief may be granted against a restrictive covenant where there is such a change in the character of the neighborhood as to render the enforcement of the covenant valueless to the coventee and oppressive and unreasonable as to the coventor." Dunlap v. Beaty, 239 S.C. 196, 122 S.E.2d 9, 15 (1961). As the restrictive covenant at issue may be declared void under applicable nonbankruptcy law, under §363(f) this court may order the subject property sold free of the restrictive covenant.

Under South Carolina substantive law a restrictive covenant is a property right upon which recovery may be allowed. School District No. 3 of Charleston County v. Country Club of Charleston, 241 S.C. 215, 227 S.E.2d 625 (1962). Where a restrictive covenant is created in furtherance of a general scheme affecting various parcels of property, such restrictive covenant may be enforced by the affected parties under theories of either mutuality of covenant and consideration or mutual negative easement.

legal or equitable proceeding, to accept a money satisfaction of such interest.

Martin v. Cantrell, 225 S.C. 140, 81 S.E.2d 37 (1954). Under South Carolina law CBCI would be a necessary party to any declaratory judgment action brought by the debtor to remove the restrictive covenant. Dunlap v. Beaty supra. As this action was brought by motion rather than the filing of an adversary proceeding with the issuance and service of a summons with complaint, CBCI voluntarily submitted itself to the jurisdiction of this court by appearing and trying the issue on the merits. Giannakos v. M/V Bravo Trader, 762 F.2d 1295 (5th Cir. 1985) (a party named in a suit may voluntarily submit to the jurisdiction of the court). With all necessary parties before this court, this court may enter a final binding order. United States v. Hall, 472 F.2d 261 (5th Cir. 1972).

Applying South Carolina law to the facts of this case the restrictive covenant must stand. Contrary to the movant's position the issue is not to determine whether in equity the relevant benefit to CBCI's property is outweighed by the burden on the debtor's property, but is to determine whether the change in circumstance has rendered the enforcement of the covenant valueless to the coventee and oppressive and unreasonable to the coventor. Dunlap v. Beaty supra. Restrictive covenants are enforceable in equity if the restrictive covenants retain a substantial value, even though because of change conditions, a hardship will be visited on the servient estate. Circle Square Company v. Atlantis Development Company, 267 S.C. 618, 230 S.E.2d 704, 709 (1976).

This restrictive covenant retains substantial value to CBCI. The adjacent property, though vacant, is currently under a 20-year lease to Food Lion grocery stores expiring January, 1992. Under the terms of the lease enforcement of the restrictive covenant is required. While the evidence is contradictory as to the Current highest and best use for the adjacent property, from the evidence presented the CBCI property was used for many years as a retail grocery store and its future use as a grocery store appears its best use. The value of the CBCI property as a grocery store is enhanced by the enforcement of the restrictive covenant in question. Under South Carolina law, the restrictive covenant is valuable and enforceable.

The final argument presented by the movant asserts a claim of laches. Although laches is actually an affirmative defense, movant uses laches offensively in an effort to defeat the restrictive covenant. As an affirmative defense, the burden of proof to establish the elements necessary to give rise to a defense of laches rest with the party asserting its protection. Circle Square Company id. at 708. The "defense" of laches must be determined in light of the circumstances of each case. Raybon v. Mali, 289 S.C. 37, 344 S.E.2d 608, 610 (1986). Laches requires actual knowledge as a prerequisite for this equitable relief. Archambault v. Sprouse, 215 S.C. 336, 55 S.E.2d 70 (1949). "Quiescence will be a bar when good faith requires vigilance. But

so long as there is no knowledge of the wrong committed and no refusal to embrace opportunity to ascertain facts, there can be no laches." Archambault id. at 72. The movants put forth no evidence whatsoever that CBCI had actual knowledge of the violation~ of the restrictive covenant prior to the debtor's efforts to sell the property during the pendency of this proceeding as a Chapter 11 case. To the contrary, the principal officer of CBCI testified that he had no knowledge of the violation until the debtor's efforts to sell the property and obtain a release of the restrictive covenant. CBCI through its principal officer acknowledges that the enforcement of the restrictive covenant was left to the tenant on the adjacent property, Food Lion. As the adjacent property is now vacant, yet still under lease, Food Lion has no incentive for enforcing the covenant. However, movants do not seek to prevent Food Lion from enforcing the covenant during the remainder of the lease. Movants seek to prevent the enforcement of the restrictive covenant by the owner of the adjacent property and any future tenant including any future retail grocer tenant.

The failure of CBCI or its tenant to enforce the restrictive covenant prior to this hearing did not result in any loss to the debtor. The principal officer of the debtor admitted full knowledge of the restrictive covenant at the time the debtor acquired the property and in direct violation of the restrictive covenant converted the property for use as a convenience store. The

debtor's investment was made before the covenant was violated. The debtor now seeks to invoke equitable principles to prevent a loss of this investment made in contemplation of violating the restrictive covenant. Equity does not favor the movants in this case and laches is not available to them.

This court having determined that the restrictive covenant in question has substantial value to the adjacent property owner CBCI and the defense of laches is not available to the movants herein, the amended motion seeking cancellation of the restrictive covenant is ORDERED denied. The original order dated December 29, 1989 authorizing sale of the subject stands as entered.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 23rd day of October, 1990.